BEFORE THE
Federal Communications Commission
WASHINGTON D.C.

In the Matters of	
GTE Telephone Operators GTOC Tariff No. 1 GTOC Transmittal No. 1148	CC Docket No. 98-79
Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Bell Transmittal No. 1986	CC Docket No. 98-103
BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476	CC Docket No. 98-161

COMMENTS ON DIRECT CASES

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To: Chief, Common Carrier Bureau

COMMENTS ON DIRECT CASES

Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby files these comments in response to the above-captioned Direct Cases of GTE Telephone Operators ("GTE"), Pacific Bell Telephone Company ("PacBell"), and BellSouth Telecommunications, Inc. ("BellSouth").[1]

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1 See GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, DA 98-1667, *Order Designating Issues for Investigation* (rel. Aug. 20, 1998) ("GTE Order"); Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Transmittal No. 1986, CC Docket No. 98-103, DA 98-1772, *Order Designating Issues for Investigation* (rel. Sept. 2, 1998) ("PacBell Order"); BellSouth Telecommunications, Inc., BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476, CC Docket No. 98-161, DA 98-1734, *Order Suspending Tariff and Designating Issues for Investigation* (rel. Sept. 1, 1998) ("BellSouth Order").

INTRODUCTION AND SUMMARY

The Common Carrier Bureau has designated for investigation whether the dedicated ADSL service offerings of GTE, PacBell and BellSouth designed to connect end users to Internet Service Providers ("ISPs") are interstate services.[2] This question can be resolved with reference to established principles for determining the jurisdictional nature of a dedicated offering (either the inseparability doctrine or, more likely, the ten percent rule).

It is critical, however, that the FCC explain in any order issued in this proceeding that its decision does not affect the regulatory treatment of switched, dial-up connections between ISP subscribers and their ISPs. Otherwise, it is likely that incumbent LECs will attempt to misuse the Commission's determination in this proceeding as a basis for arguing that switched dial-up connections that are connected to interstate Internet traffic are not subject to reciprocal compensation.

DISCUSSION

GTE states in its Direct Case that its ADSL service offering constitutes a dedicated connection between an end user and the GTE frame relay switch.[3] PacBell and BellSouth also have adopted a dedicated architecture for their ADSL offerings.[4] Under FCC

2 GTE Order at ¶ 12; PacBell Order at ¶ 10; BellSouth Order at ¶ 10.

3 See GTE Direct Case at 4.

4 See PacBell Direct Case at 2 ("Although provisioned on a packet-based technology, the ADSL service provides the same

precedent, such dedicated offerings are considered interstate and therefore subject to FCC jurisdiction if over ten percent of the traffic carried is interstate.[5]

As GTE, PacBell and BellSouth point out, the jurisdictional classification of a communication carried over a dedicated facility is based on the totality of the communication (i.e., on an end-to-end basis).[6] As the FCC's Memory Call decision shows, a jurisdictional analysis is not subdivided between common carrier/telecommunications components and enhanced/information service components.[7] Thus, where a connection between an end user and an ISP (a telecommunications service) is subsequently carried by the ISP on to the Internet across state lines (an information service), the telecommunications and the information

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dedicated functionality as a traditional special access circuit"); BellSouth Direct Case at 13 ("BellSouth's ADSL service provides a virtual dedicated connection between two customer designated locations.")

5 See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776 at ¶ 778 (1997) ("under the Commission's rules, if over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate").

6 See GTE Direct Case at 7-10. See also PacBell Direct Case at 3-10; BellSouth Direct Case at 8-11.

7 See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1621 (1992), aff'd, Georgia Pub. Serv. Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993) (holding that voice mail service is part of an interstate service where connected to interstate interexchange traffic).

service components are considered parts of an interstate communication that is inseverable for jurisdictional purposes.[8]

TWTC is concerned that incumbent LECs will attempt to rely on the application of these principles for an unfounded legal conclusion regarding switched, dial-up connections to ISPs. The ILECs are likely to observe that, just as with dedicated local connections to ISPs, the jurisdiction of switched, dial-up connections to ISPs is determined based on the totality of the communication in question (telecommunications and information service combined). The ILECs will then likely attempt to rely on this conclusion for a proposition it does not support. Specifically, the incumbents will try to argue that, like dedicated connections, switched local connections to ISPs that are part of an interstate communication must be subject to the FCC's interstate carrier access regime and cannot be subject to reciprocal compensation.[9]

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8 As GTE points out in its Direct Case, it may be appropriate to treat the instant offering under the inseparability doctrine if the FCC determines that the special access analogy does not hold up. See GTE Direct Case at 15-19. Also, it may be that the Commission will reject the ILECs' characterization of their ADSL offerings as dedicated, and instead consider the service as locally switched. In that case, of course, the service would have to be tariffed at the state level.

9 The incumbent LECs have made similar arguments in support of their refusal to pay reciprocal compensation on ISP traffic. See, e.g., Southwestern Bell Telephone Co. v. Pub. Util. Comm'n of Texas, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938, at *24 (W.D. Tex. June 16, 1998) (Southwestern Bell "contends that the PUC lacked jurisdiction under federal law to regulate and set rates for communications accessing the Internet. Furthermore, the Plaintiff contends that Internet connections must be treated as interstate calls, not local calls."); Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc., No. 5:98 CV 18, 1998 U.S. Dist. LEXIS 13703,

Even if the Commission ultimately determines in a separate proceeding that switched, dial-up traffic can be interstate, there is no reason that the traffic is not still subject to reciprocal compensation. This is because the regulatory arrangements governing local dedicated connections to ISPs and those governing local switched connections to ISPs are different. This difference arises from the fact that the FCC treats information service providers, including ISPs, as end users. The FCC has therefore required local exchange carriers to sell switched connections to ISPs out of state business local exchange service tariffs rather than interstate access tariffs.[10] This arrangement applies regardless of whether all or none of the traffic carried over the switched local connection is part of an interstate communication. As the FCC recently explained,

> As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, <u>even for calls that appear to traverse state boundaries</u>.[11]

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at *10-11 (W.D. Mich. Aug. 26, 1998) (Ameritech "argues that, because: 1) calls to ISPs are mechanically akin to exchange access calls made to long distance carriers, 2) those calls involve communications with interstate, and often international locations, and 3) during the past 15 years, the [FCC] has repeatedly noted that calls to ISPs are 'jurisdictionally interstate' calls, calls made to ISPs are interstate calls for which Ameritech is not required to pay reciprocal compensation.")

10 <u>See</u> <u>Access Charge Reform</u>, CC Docket No. 96-262, *First Report and Order*, 12 FCC Rcd 15982, ¶¶ 344-348 (rel. May 17, 1997) (reaffirming long-standing FCC policy of treating information service providers as end users, thus making carrier's carrier access charges inapplicable).

11 <u>See</u> <u>id.</u> at ¶ 342 (1997) (underlining added).

In contrast, the Commission has chosen to exercise regulatory authority over local dedicated connections between subscribers and ISPs when more than ten percent of the traffic carried over those connections is interstate.[12]

Under this long-standing regime, a subscriber of an ISP or any other information/enhanced service could purchase its connection to the ISP in one of two ways. If the subscriber's volume of traffic destined for the ISP were large enough, the subscriber could purchase a dedicated, special access connection to the ISP. Again, if more than ten percent of the traffic carried by the dedicated line were to be interstate, the end user would purchase the special access connection out of a federal tariff. Otherwise, the subscriber would purchase the special access connection out of a state tariff.

On the other hand, the subscriber could also use a regular switched local telephone line (with modems) to carry traffic to the ISP. In this case, all such data traffic, whether ultimately intrastate or interstate, would be delivered to the ISP over the ISP's switched local business lines purchased under a state tariff.[13]

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12 The FCC has explicitly found that end users, such as ISPs, may buy special access circuits out of interstate tariffs. See MTS and WATS Market Structure, *Memorandum Opinion and Order*, 97 FCC 2d 682, 703 (1983) (allowing end users to purchase special access facilities). As mentioned, where more than ten percent of the traffic traversing such special access lines is interstate, the FCC regulates the service. See footnote 5 supra.

13 This different regime makes good policy sense. The carrier charges in the FCC's switched access regime have historically included charges associated with recovering incumbent LEC historical costs and the costs of universal

After passage of the Telecommunications Act of 1996, ISPs were for the first time offered the option of purchasing switched local business service from competitive LECs. Where an ISP is served by a CLEC and the ISP's customers are served by the incumbent, the question has arisen as to whether such traffic is subject to reciprocal compensation. The answer to that question is clear. There are only two existing mechanisms available for compensating the two carriers for this traffic (if the FCC ultimately determines that it is interstate): interstate switched access charges or reciprocal compensation. ISPs are not subject to switched interstate access charges. Therefore, reciprocal compensation applies.[14] In addition, competitive LECs incur very real costs in transporting and terminating traffic to

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service. See Access Charge Reform, at ¶ 345 (explaining that it is inappropriate to impose carrier per-minute access charges on ISPs because, inter alia, "[t]he access charge system contains non-cost-based rates and inefficient rate structures"). In order to protect the information service providers, including ISPs, from the distortionary effects of these rates, the FCC has repeatedly decided that those carriers should not pay switched interstate access. See id. In contrast, the rates for dedicated access services have historically been closer to cost. Indeed the FCC has investigated assertions that those services are priced below cost by incumbent LECs. See Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 5154 at ¶ 171 (1994). Thus, there has been no reason for the FCC to exclude those purchasing dedicated connections to ISPs from paying interstate tariffed rates for those facilities.

14 Incumbent LECs have in the past emphasized that ISPs are considered to be end users for the purposes of access charges only. But because only two mechanisms exist for pricing carrier exchange of traffic (access and reciprocal compensation), one or the other of these two regimes must apply. Thus, where the FCC has stated that access charges do not apply, it has also determined that reciprocal compensation does apply.

ISPs as with any locally dialed traffic. Section 251(b)(5) requires that they be compensated for those costs.[15]

This result is a logical extension of the FCC's long-standing policy that the states should regulate the prices paid by the calling subscriber and the called ISP for the lines over which switched traffic is carried. Moreover, just as the states retain jurisdiction over the business lines to which ISPs subscribe for the purpose of providing interstate Internet access, so too the states retain jurisdiction over reciprocal compensation rates governing that same traffic.[16]

But the Commission need not even reach this issue. As explained, an FCC determination that a particular dedicated connection to ISPs is interstate does not establish any precedent for switched local connections to ISPs. Thus, in the instant proceedings, the FCC should verify that the ADSL services are in fact dedicated (as they appear to be) and condition the FCC's exercise of jurisdiction over the offerings on a finding that more than ten percent of the traffic carried over the line is interstate. The Commission should also clearly state that tariffing these ADSL dedicated offerings at the federal level in

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15 See 47 U.S.C. § 251(b)(5) (establishing the duty for all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications").

16 In the local competition order, the FCC "delegated" to the states the responsibility for setting symmetrical reciprocal compensation rates. Implementation of Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, ¶¶ 1089-90 (1996). The Eighth Circuit later ruled that states have jurisdiction over all aspects of reciprocal compensation. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 794-800 (8th Cir. 1997).

no way changes the fact that switched dial-up connections are governed entirely by state regulation (state tariffs, state determined rates for reciprocal compensation) even when those dial-up connections are used to provide interstate service. This conclusion means further that the FCC's decision in these proceedings does not affect the state commission and federal court decisions ordering incumbents to pay reciprocal compensation on ISP traffic.

This result is consistent with the position taken by the FCC itself in a recent federal district court filing. The FCC concluded that the question of whether reciprocal compensation applies to ISP traffic is not at issue in the instant GTE tariff proceeding:

> The FCC notes that the jurisdictional issues before it in the [GTE ADSL] tariff proceeding does not involve application of the reciprocal compensation provisions of Section 251(b)(5) or interpretation of the terms of an interconnection agreement.[17]

Indeed, GTE also agrees with this conclusion. It states in its Direct Case that the jurisdictional question raised by its tariff "is a narrow one" and that "whether a CLEC which receives 'dial-up' Internet access traffic from an ILEC customer is entitled to reciprocal compensation for terminating traffic from

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[17] See Response of Federal Communications Commission as Amicus Curiae to Motion for Referral of Issue, at 6, filed in BellSouth Telecommunications, Inc. v. US LEC of North Carolina, Civil Action No. 3:98CV170-MU (W.D.N.C.). There is no reason to believe the Commission would take a different approach with respect to the substantially similar PacBell and BellSouth transmittals.

the ILEC need not be decided here."[18] The FCC must make sure that the other ILECs are forced to share this view.

In any event, it would be improper as a matter of procedure and fairness to address the status of reciprocal compensation for ISP traffic in this tariff proceeding. Tariff proceedings are highly inappropriate contexts in which to establish general policy rules because of the limited right to appeal such decisions.[19]

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18 See GTE Direct Case at 7.

19 See Papago Tribal Util. Auth. v. Federal Energy Regulatory Comm'n, 628 F.2d 235, 240 (1980); Western Union International Inc. v. FCC, 652 F.2d 136 (1980) (Commission order approving or allowing a tariff to become effective cannot be appealed).

CONCLUSION

As the FCC has itself already concluded, the application of reciprocal compensation to ISP traffic is not before it in this proceeding. Thus, in this proceeding, the FCC should confirm that the offering in question is in fact dedicated and then determine whether more than ten percent of the traffic carried over the facility is interstate.

But the FCC must also prevent incumbent LECs from impermissibly relying on this decision as a basis for refusing to pay reciprocal compensation on traffic carried over switched dial-up connections to ISPs. The Commission must therefore state in no uncertain terms that its decision on the jurisdictional status of the GTE, PacBell and BellSouth ADSL offerings in no way affect the analysis of whether reciprocal compensation applies to switched, dial-up connections to ISPs. Moreover, the FCC should explicitly state that its conclusions in these proceedings do not affect the state commission and federal court decisions ordering incumbents to pay reciprocal compensation for terminating ISP traffic.

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September 18, 1998

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, hereby certify that, on 18 September 1998, copies of the foregoing "Comments on Direct Cases" of Time Warner Communications Holdings Inc. were served by First Class Mail, postage prepaid, except where indicated otherwise, upon the following:

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